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Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, 97-1141

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

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ARGUMENT

While the FCC's *Local Competition Order* contains many determinations that were challenged on the merits by the incumbent telephone companies at the Eighth Circuit, only two portions of that order were singled out when the incumbents requested and obtained a stay: (1) the FCC's pricing rules, and (2) the FCC's interpretation of section 252(i), which provides "most favored nation" treatment for individual portions of interconnection agreements.[1]

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[1] This reply brief addresses only the Respondents' arguments (continued...)

But the importance attributed to section 252(i) by the incumbents during the stay proceedings below has disappeared from their briefs on the merits. SBC, Bell Atlantic, and BellSouth, representing five of the seven original regional Bell Operating Companies, devote only three pages to this issue at the end of their seventy-five page brief, and the other incumbents are similarly silent.[2] The Association for Local Telecommunications Services and its members joining this brief respectfully suggest that the incumbents are attempting to hide what they cannot defend.[3] Section 252(i) remains a key portion of Congress' pro-competitive scheme, and this Court should take care to uphold the FCC's implementation of this provision.

Under the familiar two-phase test of *Chevron*, a reviewing court looks first to statutory language to support an agency's interpretation, and only in the absence of that language does it turn to "the structure and language of the statute as a whole." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984), quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). The FCC's rule requiring that individual portions of interconnection

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[1](...continued)
concerning section 252(i). ALTS supports the arguments of other petitioners concerning: (1) the FCC's jurisdiction to adopt pricing rules; (2) the FCC's definition of network elements, including Operations Support Systems; and (3) the FCC's definition of "necessary" in regards to network elements.

[2] *See* SBC Brief at 72-75; U S WEST Brief at 53-57; GTE Brief at 71-73. The issue goes unmentioned by Ameritech.

[3] ALTS is a national trade association representing facilities-based providers of competitive local telecommunications services.

agreements be made available to requesting carriers is grounded in the specific language of section 252(i):

> "A local exchange carrier shall make available *any interconnection, service, or network element* provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (Emphasis supplied.)

Thus, the plain language of the statute demonstrates that requesting carriers are entitled to obtain any particular network element or service provided "under the agreement," and need not accept the agreement in its totality. The Eighth Circuit's opinion, by contrast, in effect rewrites the statute to read: "A local exchange carrier shall make available any agreement approved under this section to which it is a party to any other requesting telecommunications carrier." Congress, however, did not write section 252(i) this way, and the contrast between the Eighth Circuit's version and the language Congress actually chose fully establishes that the FCC's reading passes the first phase of *Chevron*.

Among all the incumbents, only GTE responds to this fact, claiming that "While the court cast its analysis under the second step of *Chevron*, it would also have properly fit under the first. Examination of the structure and purposes of a statute is one of the 'traditional tools of statutory construction,' *Regions Hospital* v. *Shalala*, 118 S. Ct. 909, 915 (1998)" (GTE Brief at 73 n.26). This is a profound misapplication of *Chevron*. Once the Eighth Circuit found support for the FCC's rules in "the language of subsection 252(i) in isolation ..." (Pet. App. 25a), its task was completed and the rules should have been affirmed. It would effectively destroy *Chevron's* first phase if reviewing courts could disregard black letter law supporting agency action, and turn

instead to an enactment's "structure and purposes."

Unable to counter the firm grounding of the FCC's rules in the statute, the incumbents focus instead on the second phase of *Chevron*.[4] While these claims are irrelevant given the vindication of the FCC's rules under the first phase of *Chevron*, they are also unsupported by the structure of the Act and unfounded for several reasons. *First*, the incumbents portray themselves as champions of the negotiation process, and attack the FCC rules for permitting requesting carriers to substitute terms from other agreements that are different from terms that were bilaterally negotiated earlier by the requesting carrier. According to the incumbents, this extends the negotiating process impermissibly because incumbents must negotiate knowing that individual items will have to be made available to other requesting carriers. U S WEST Brief at 56; GTE Brief at 73; SBC Brief at 74.

This is advice from foxes about how to build a henhouse. As the FCC correctly observed, it is the new entrants that are injured by any resultant delay in the negotiations process, not incumbents seeking to preserve their $100 billion a year monopoly. (Pet. App. at 263a.) Only the new entrants would have standing to complain about any delay produced by the FCC's rules.

Second, the incumbents claim the rules would render interconnection agreements "not binding" because new entrants could substitute individual portions from other new entrants' interconnection agreements for the portions of their own negotiated agreements dealing with the same topic. US WEST Brief at 56-57; SBC Brief at 73. But the interpretation

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[4] SBC never mentions *Chevron* in its section 252(i) discussion, and bases its defense of the Eighth Circuit solely upon policy arguments (SBC Brief at 72-75).

of section 252(i) being urged by the incumbents -- the substitution of an another new entrant's *entire* agreement instead of only selected portions -- would work an even greater change on existing contracts. Plainly, the incumbents cannot complain about the abrogating effect of the FCC's rules while supporting a position with even greater effect. More fundamentally, however, the incumbents' claim that negotiated contracts are rendered "not binding" by section 252(i) is simply wrong. "Most favored nations" clauses are commonly included in privately negotiated trade, procurement, and labor contracts without rendering any of these devices "not binding." Indeed, Congress has elsewhere employed statutory mechanisms for analogous purposes -- for example, the Robinson-Patman Act assures that smaller retailers obtain wholesale prices similar to those offered larger firms (15 U.S.C. § 13a). Whatever debate might exist about the wisdom of Congress' intervention in markets, such mechanisms have never been overturned on the ground that they render private contracts "not binding."[5]

Third, the requirement of the FCC's rules that individual items of interconnection agreements be provided to all requesting carriers so long as there are no appreciable differences in the underlying cost of provisioning, is neither so novel nor so dramatic as the incumbents suggest.[6] Rather,

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[5] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 n.23 (1977), cited by incumbents in support of their claim, holds only that it would be an "absurdity" under ordinary contract law to conclude that sovereign entities had somehow implicitly reserved a right *not* to pay contractual obligations at the same time they issued express obligations to pay.

[6] *See* SBC Brief at 73: " ... this bizarre rule;" U S WEST Brief at (continued...)

it is simply the general non-discrimination obligation that has been applied to the incumbents' regulated services for more than a century, now extended to the contractual interconnection arrangements whereby incumbents supply wholesale services to new entrants. 47 U.S.C. § 202(a). Because these contracts typically contain multiple services and network elements, the disaggregated "most favored nations" right created by section 252(i) is an appropriate and necessary mechanism to insure non-discrimination in the incumbents' provisioning of wholesale services.

CONCLUSION

For the foregoing reasons, the FCC's rules implementing section 252(i) of the Telecommunications Act of 1996 should be upheld.

Respectfully submitted,

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[6](...continued)
55: "It precludes meaningful negotiation of binding agreements ...;" GTE Brief at 73: "By artificially compartmentalizing every issue, the FCC's rule ignores the reality of bargaining ...."

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